

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
REPLY BRIEF**





77-6168

To be argued by  
WERNER L. POLAK

**United States Court of Appeals**

FOR THE SECOND CIRCUIT

No. 77-6168

UNITED STATES OF AMERICA,  
*Plaintiff-Appellee-Cross Appellant,*

*—against—*

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,  
*Defendant-Appellant-Cross Appellee.*

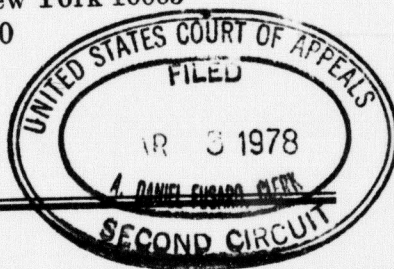
*On Appeal from the United States District Court  
for the Southern District of New York*

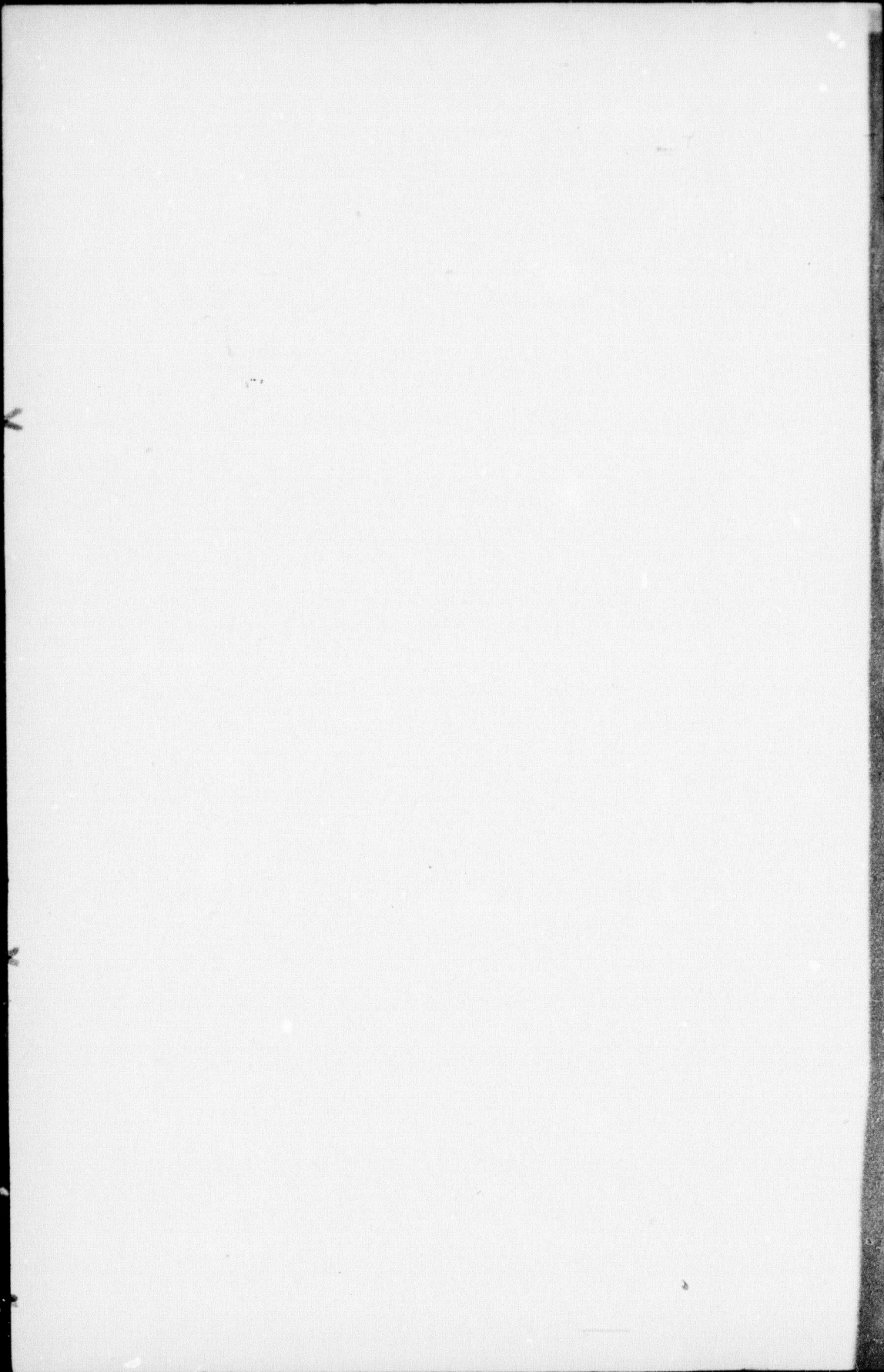
**REPLY BRIEF OF DEFENDANT-APPELLANT**

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# **United States Court of Appeals**

**FOR THE SECOND CIRCUIT**

**No. 77-6168**

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**UNITED STATES OF AMERICA,**  
*Plaintiff-Appellee-Cross Appellant,*  
*—against—*

**CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,**  
*Defendant-Appellant-Cross Appellee.*

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*On Appeal from the United States District Court  
for the Southern District of New York*

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## **REPLY BRIEF OF DEFENDANT-APPELLANT**

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### **STATEMENT OF THE CASE**

This brief is submitted on behalf of defendant-appellant-cross appellee Consolidated Edison Company of New York, Inc. ("Con Edison") in response to the brief of the plaintiff-appellee-cross appellant United States of America. This brief first replies to plaintiff's arguments with respect to Con Edison's appeal and then answers the plaintiff's arguments with respect to plaintiff's cross-appeal.

### **ARGUMENT**

In its brief plaintiff has attempted, usually by ignoring crucial facts and findings of the District Court, to mischaracterize and distort both the situation facing Con Edison in July 1970 and the nature of the transaction

between Con Edison and plaintiff. A short restatement of certain facts is therefore necessary.\*

On July 21, 1970, Con Edison suffered a breakdown of its largest generating unit, eliminating Con Edison's "reserve," i.e., available generating capacity not immediately needed to provide the New York City area with electricity. (A29, Op 6; A796) The breakdown did not result in a blackout or even in partial cutoffs or reductions of power, and there was no danger of death or injury to any citizens. Even if Con Edison had not received the 200 MW from plaintiff, the most serious possible consequence would have been short, temporary cutoffs of power to some customers; most probably, only voltage reductions would have occurred. (A991, A994) In short, the situation was an emergency within the Con Edison system, but not a disaster threatening injury to the public.

On July 22, 1970, after White House officials became aware of the Ravenswood breakdown, David Freeman of the Office of Emergency Preparedness called on Con Edison to inquire whether plaintiff could assist the utility pursuant to the May 5 Plan. (A30-A31, Op 7-8) Charles Luce of Con Edison accepted this offer in a conversation with Freeman on July 23. (A803) At this point there still had been no mention by any representative of plaintiff that a surcharge would be imposed on the release. (A31, Op 8) On the same day, the White House directed the AEC to proceed with the release, and issued a press release announcing its action. (A2064-A2065, DX R-3) The AEC staff acknowledged that the decision to go forward was out of their hands. (A35, Op 12) Not until the next day, July 24, did George Quinn of the AEC contact Charles Luce of Con Edison, and then primarily to discuss arrangements for transmission of the power to New York. (A92, A307-A308) During

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\* Plaintiff introduces its argument by stating that "Con Edison has . . . made a broad attack on the District Court's findings as to liability and damages." (Pl. Br. 32) This is a mischaracterization of Con Edison's argument. In most of its points, Con Edison challenges only the legal conclusions drawn by the District Court; it accepts the key factual findings and bases its legal arguments primarily upon them.



the course of this conversation, Quinn told Luce that the AEC expected to be reimbursed for certain losses resulting from the reduction of power. (A36, Op 13) Quinn was unable to advise Luce as to the possible amount of this "surcharge." (A37, Op 14) Luce responded that Con Edison would be willing to pay a surcharge on the same basis as previous recipients of AEC power under the May 5 Plan. (A36, Op 13) The AEC had not asked these recipients to pay a surcharge, but Quinn did not so inform Luce. (A37-A38, Op 13-14) Instead, Quinn told Luce that the AEC's losses on the release to Con Edison would be higher than those on the previous release to other recipients. (A37, Op 14) Luce then repeated that Con Edison would pay only on an equal basis, and Quinn made no further statement on the matter. (A821-A822; A863-A865)

On or about July 24, Con Edison was informed by an officer of another utility that there had been a 10% to 20% surcharge on the power released to the previous recipients. (A955-A956) But on August 6, after Con Edison had been receiving the power for approximately 10 days, its officers learned that the AEC was attempting to impose a surcharge amounting to 104 percent of the cost of the power itself, and that the previous recipients of AEC power had not been required to pay any surcharge. (A43-A44, Op 20-21) Con Edison immediately protested to the AEC both the amount of the surcharge and its discriminatory imposition. (A44, Op 21) Consistent with Luce's firm statement to Quinn on July 24, Con Edison maintained this "equal treatment" position during its discussions with the AEC throughout the summer and fall. (A45, Op 22; A2080-A2081, DX H-4; A483-A487; A2340-A2348, DX K-8)

### **I. Plaintiff Is Not Entitled To Recover In Restitution**

Plaintiff argues that Con Edison is liable for all the costs incurred by the AEC in releasing the 200 MW because plaintiff acted, under emergency conditions, to fulfill Con Edison's duty to provide power to the New York City area. Plaintiff attempts to support the District Court's



legal conclusion that there exists a "doctrine of emergency assistance" which dictates a recovery by plaintiff.

Con Edison submits that the special restitution principles alleged to constitute this doctrine are inapplicable here, and that plaintiff is further precluded from a recovery by general principles of restitution.

**A. Plaintiff Did Not Act In An "Emergency"**

A key element in plaintiff's theory is that it rendered assistance to Con Edison in "an emergency which endangered the health and safety of [its] customers." (Pl. Br. 36) According to plaintiff, its actions in this emergency entitle it to restitution under principles contained in Sections 114 and 115 of the Restatement of Restitution and *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830 (2d Cir.), *cert. denied*, 98 S.Ct. 183 (1977). But these principles are quite narrow in scope and apply only where there is grave peril to human life or safety, not to the situation that Con Edison faced in July 1970.

Section 115 of the Restatement applies only where plaintiff has supplied "things or services . . . immediately necessary to satisfy the requirements of public decency, health, or safety." Section 114 speaks in terms of "serious bodily harm." The illustrations to both sections demonstrate their very narrow scope. In *Peninsular*, where a seaman had suffered a heart attack, this Court similarly indicated that recovery for emergency assistance "is limited to cases where the services are immediately necessary to prevent injury or suffering." 533 F.2d at 834.\*

In view of this strict limitation on the recovery, plaintiff not surprisingly attempts to sensationalize the nature of

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\* In addition, while Section 114 may apply where an emergency is so acute that a person does not have the opportunity to communicate with and obtain the approval of the person having the duty, there is no intimation that it is at all applicable in a case such as this, where plaintiff not only had such an opportunity, but took it, and was put on notice by Luce that Con Edison would pay only if treated equally with prior recipients. Similar reasoning governs Section 115 which applies only where the person providing assistance has indicated an intent not to perform his duty. See Comment a to § 115. Con Edison never indicated that it would not or could not perform its duty as defined in section I.B. of this Argument.

the "emergency" faced by Con Edison after the Ravenswood outage. The testimony, however, was conclusive that even in the absence of the 200 MW received from plaintiff there existed at most only a possibility that some customers would experience a temporary cutoff of power—hardly an immediate danger of death or injury. Bertram Schwartz, Con Edison's Senior Vice President, gave the following 3 uncontradicted testimony on this point:

"There were approximately four[teen] days\* in which Con Edison had to reduce voltage during this period [i.e., the period during which it received the 200 MW]. On several of these days we reduced voltage only 3 percent and on other days only 5 percent, and during those days we would have had to reduce voltage somewhat more without this power [i.e., the 200 MW].

"On those days when we reduced voltage 8 percent, which is the limit of the amount of voltage reduction that we can apply, we would have had to disconnect some customers. These disconnections would have been infrequent and rotated. That is, any given customer would not have been subjected to an outage of more than two hours in any day, and that might have occurred on, oh, certainly less than a handful of days, certainly less than five days." (A991-A992)

Schwartz went on to explain the effect of a voltage reduction:

"... the customer inconvenience of voltage reductions is quite small. In most instances it is not noticed at all by the customer.

"At 8 per cent he will perceive a shrinkage on his television screen or an electric motor would run slightly hotter.

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\* The transcript erroneously records Schwartz as having said four rather than fourteen days. As indicated in his later testimony and in the findings of the District Court, Schwartz testified as to fourteen days. (A993-A994; Op. 16, A39) The dates of the reductions are listed in Con Edison's answers to plaintiff's interrogatories. (A1795-A1796)



“At 5 and 3 percent it would take an instrument to lightly discern the difference.” (A994)

These kinds of inconvenience certainly do not rise to the level required for invocation of plaintiff’s “emergency assistance” doctrine.

Charles Luce did testify, as plaintiff points out, that he regarded the Ravenswood outage as an emergency. However, to characterize a situation as an emergency is not necessarily to imply that there is an immediate danger of death or injury. For Luce, the loss of Ravenswood was a very serious matter, just as any officer of an industrial concern regards the loss of an important piece of equipment as a genuine emergency for the company. But the evidence remains clear that no lives or bodily harm were even remotely threatened. Nor did the District Court make any finding that there was such a threat. Moreover, the “emergency assistance doctrine” permits a recovery in restitution only if plaintiff acted immediately. In this case, the breakdown occurred on July 21, but plaintiff did not release the power until July 27.

**B. Con Edison Did Not Have An Absolute Duty To Supply Electricity To Its Customers**

Con Edison has argued that because plaintiff presented no evidence that Con Edison was not fulfilling its duty to provide electricity, plaintiff cannot assert that it fulfilled that duty. (CE Br. 57-60) In response, plaintiff merely reiterates the District Court’s legal conclusion that Con Edison had a duty to supply electricity to the New York area.

First, plaintiff did not respond to Con Edison’s contention that the District Court erred in basing its finding of Con Edison’s duty upon the legal conclusions of two witnesses. (CE Br. 57-58) As Con Edison has argued, the true duty is found in New York law.

Con Edison does not, as plaintiff states, seek “to distinguish between its legal duty to provide power and some other unspecified, absolute duty.” (Pl. Br. 36) Con Edison



asserts simply that its legal duty—the sole duty at issue here—is not absolute. By statute Con Edison is required to provide electricity to customers who apply for it and then to supply safe and adequate service. N.Y. Transp. Corp. Law § 12 (McKinney 1977-78 Pkt. Pt.); N.Y. Pub. Serv. Law § 65 (McKinney 1955). These duties are not absolute, and one qualification upon them is a New York Public Service Commission schedule exempting Con Edison from ordinary negligence in the valid exercise of its powers and permitting Con Edison to interrupt service without liability under emergency conditions.\* Thus, Con Edison's duty is to avoid gross negligence in maintaining a continuous supply of power to its customers.\*\* There was no evidence or finding that Con Edison was grossly negligent with respect to the Ravenswood breakdown, and no evidence or finding that Con Edison's failure to obtain additional power would have been grossly negligent. Without such a showing, plaintiff cannot claim to have fulfilled Con Edison's duty.

Plaintiff never came to grips with the legal duty imposed by the Public Service Commission schedule. Instead, it merely repeated the District Court's conclusion—made without reference to the schedule or to any decisional or statutory law—that Con Edison has a duty to provide electricity. (Pl. Br. 37-39) Plaintiff's argument on this point, when stripped of rhetoric, is this: Because Con Edison had a general duty to supply electricity, it would be compelled

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\* In the first footnote on page 38 of plaintiff's brief, where plaintiff states that the schedule does not cover a deliberate interruption of service, plaintiff has ignored the second provision of the schedule, which covers such interruptions. Moreover, an intentional interruption could be negligently initiated, in which event the first provision would still apply.

\*\* The cases cited by plaintiff on page 37 of its brief are not to the contrary. Each case involves the cutoff of a single customer's service, and the courts merely reiterate the statutory duty. Plaintiff has ignored the cases cited by Con Edison that uphold the validity of the Public Service Commission schedule. (CE Br. 59)

to accept any power made available to it, and then to pay any price that the supplier chose to seek, without any discretion whatsoever on the part of Con Edison. The injustice inherent in such an argument is manifest—particularly when the government of the United States released such power under a plan specifically promulgated for the emergency encountered.

**C. The Proper Measure Of Recovery Is The Benefit Received By Con Edison**

Con Edison has demonstrated, with the support of overwhelming authority, that the proper measure of recovery in restitution is the benefit received by the defendant, not the cost to plaintiff in conferring the benefit. (CE Br. 46-49) In response, plaintiff asserts that the District Court properly applied a “cost to plaintiff” measure because of the “sui generis” nature of this case. (Pl. Br. 56) In support of this proposition, plaintiff has cited a total of five authorities: two cases that are clearly distinguishable from this one, one case of doubtful authority, and one case and a treatise that directly support Con Edison’s position.

Plaintiff states that this Court held in *Peninsular & Oriental Steam Navigation Co. v. Overseas Oil Carriers, Inc.*, 553 F.2d 830 (2d Cir.), *cert. denied*, 98 S.Ct. 183 (1977), that “a plaintiff who renders assistance in an emergency is entitled to the reasonable value of his services ‘regardless of the benefit actually conferred.’ ” (Pl. Br. 56) This is not a proper construction of *Peninsular’s* holding. The phrase quoted must be examined in context:

“... the OVERSEAS PROGRESS was in a far better position to evaluate the relevant costs and benefits of seeking various forms of aid for Turpin [the stricken seaman]. . . . Since vessels such as OVERSEAS PROGRESS are best able to avoid unnecessary costs in

obtaining medical aid for their crewmen, we conclude that the owners of such ships are liable for the reasonable value of services rendered by other vessels at their request, regardless of the benefit actually conferred." 533 F.2d at 836.

This Court did not hold, as plaintiff would have it, that a cost-to-plaintiff recovery applies whenever emergency assistance has been rendered. The cost-to-plaintiff measure was appropriate in *Peninsular* only because the captains of vessels with injured crewmen are in a better position than the captains of potential rescue vessels to evaluate the costs involved. As this Court said,

"In determining the proper course of action, they [captains of vessels] must consider the seriousness of the seaman's illness, the availability and adequacy of medical facilities and the costs that will be incurred in securing aid. Once it is established that the fuel expenses of a ship rendering assistance is one of those costs, it will simply become another factor to be considered in the master's calculation. With radio-telegraphy, it is a simple matter for him to ascertain the size and location of ships in the vicinity . . . and to determine which vessel can be reached with minimum expense and delay." *Id.*

In the instant case, it was anything but a "simple matter" for Con Edison to become aware of the costs involved with the AEC's reduction of power. Indeed, the AEC itself could not ascertain the costs on July 24, when Luce allegedly agreed to accept the surcharge. Unlike the captain in *Peninsular*, Luce was not in a better position than the AEC to evaluate the costs of a power reduction. Where the captain of a vessel could be expected to evaluate the expense of operating another vessel, the chief executive officer of an electric utility could not have been expected to evaluate the expense of operating a uranium enrichment plant. Neither Luce nor anyone else at Con Edison was familiar enough with the gaseous diffusion process even to speculate that



the surcharge would include diverse cost items that are quite remote from the enrichment process itself.\*

Thus, even assuming that so pervasively maritime a case as *Peninsular* has any bearing here, it is clear that the rationale for the cost-to-plaintiff recovery in *Peninsular* does not appear in this case.\*\*

Plaintiff also cites *Cotnam v. Wisdom*, 104 S.W. 164 (Ark. 1907), in support of a cost-to-plaintiff recovery. (Pl. Br. 56) *Cotnam*, however, is expressly limited to situations involving emergency surgery and is not applicable here: "So that a surgical operation be conceived and performed with due skill and care, the price to be paid therefor does not depend upon the result." 104 S.W. at 166. In *Mathews v. Continental Roll & Steel Foundry Co.*, 121 F.2d 594 (3d Cir. 1941), the court applied the very benefit-to-defendant measure which Con Edison asserts here. (Pl. Br. 56) The issue in *Mathews* was simply whether there had been any benefit to the defendant. The page of Professor Williston's treatise cited by plaintiff simply does not address the point for which it was cited. However, as Con

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\* Luce never testified, as plaintiff states, "that he would expect the AEC to incur the kinds of costs involved in the surcharge." (Pl. Br. 41) Luce stated only that he had a general understanding that "loss of efficiency means higher cost." (A870)

Plaintiff emphasizes that Fred Chambers of TVA testified that he advised Luce on July 23 that the cost of the power might amount to 12 to 14 mills per kilowatt hour. (Pl. Br. 40-41) First, even if Chambers did make such a statement, it was far too vague to permit Luce to evaluate the situation with the degree of certainty contemplated in *Peninsular*. As his testimony shows, Chambers was merely speculating: "I flagged him [Luce] to the effect saying that this can turn out to cost you 12 or 14 mills a kilowatt hour. I just don't know and nobody else does until AEC finishes their computations." (A393) Second, Luce testified that Chambers did not advise him of any extra AEC costs. (A807-A808) This contradiction and the questionable weight of Chambers' testimony are fully discussed on page 15 of Con Edison's main brief.

\*\* The *Peninsular* case is distinguishable from the instant case in several other material aspects. (CE Br. 49-53) In its answering brief, plaintiff failed to respond to some distinctions and simply repeated the District Court's analysis with respect to others. Since Con Edison has already addressed the District Court's analysis in its main brief, Con Edison continues to rely on the points made there.

Edison indicated on page 47 of its main brief, Williston has firmly stated his position on the issue: "Benefit to the Defendant Is the Proper Measure of Restitution." 12 Williston, Contracts 292 (3d ed. 1970) (title of Section 1482). Con Edison demonstrated in its initial brief that the final case cited by plaintiff (Pl. Br. 56), *Campbell v. TVA*, 421 F.2d 293 (5th Cir. 1969), was based on that court's misapplication of restitution principles. (CE Br. 53) Plaintiff did not defend *Campbell* against this assertion.

In summary, there is no authority for plaintiff's position that this case calls for a cost-to-plaintiff measure of recovery. The remedial goal of restitution is to prevent unjust enrichment of the defendant, and any recovery therefore must be based upon such enrichment. As discussed in its main brief, Con Edison was enriched only by the power that it received. Since Con Edison paid for this power, the enrichment was not unjust, and plaintiff is entitled to no recovery on a theory of restitution.

**D. Con Edison Was Not Unjustly Enriched By  
Receipt Of The 200 MW**

In its main brief, Con Edison challenged the District Court's conclusion that Con Edison was unjustly enriched by plaintiff. (CE Br. 43-46) While relying on vague speculation as to an intangible benefit, the District Court ignored the only specific and substantiated testimony on the subject. In response to the law and evidence discussed by Con Edison, plaintiff has merely quoted at length from the District Court's opinion. (Pl. Br. 43-44) Con Edison therefore continues to rely upon the points made in its main brief.

**E. Plaintiff May Not Have Restitution  
Because Plaintiff Rendered Performance  
With Knowledge That Con Edison Had Denied  
The Alleged Contract**

Plaintiff asserts (1) that Con Edison never repudiated its alleged contract with plaintiff and (2) that any repudia-



tion was nullified by Con Edison's continued acceptance of the power. (Pl. Br. 44-45)

First, Con Edison's continued statements that it would pay a surcharge only if the other recipients of power paid one is inconsistent with the alleged contract to pay any surcharge assessed by the AEC—particularly when the AEC knew that the previous recipients were not even asked to pay any surcharge. Under these circumstances, Con Edison's statements constitute a clear repudiation of any agreement to pay the surcharge as claimed. (See CE Br. 55) Second, as discussed on page 56 of its main brief, Con Edison's continued acceptance of the power was consistent with its repudiation, and since plaintiff could have terminated the power reduction at any time, Con Edison's position did not compromise plaintiff.

## **II. Con Edison Is Not Estopped From Asserting The Statute Of Frauds Against An Alleged Contract**

Plaintiff asserts that it reasonably relied to its detriment on a representation by Con Edison that Con Edison would pay the claimed surcharge, and that Con Edison is thus estopped from asserting the Statute of Frauds against an alleged contract to pay the surcharge. However, plaintiff has failed to demonstrate the existence of the requisite elements of an estoppel.

### **A. Con Edison Did Not Represent That It Would Pay A Surcharge As Assessed By The AEC**

Plaintiff first contends that on July 24, 1970, Charles Luce told George Quinn that Con Edison would pay the AEC's costs as assessed by the AEC. (Pl. Br. 49) This conclusion is inconsistent with the evidence and with the District Court's findings of fact. The District Court found: "Luce stated that Con Edison would be willing to pay *whatever surcharge had been paid by the recipients of the*



*previous 450 MW reduction.*" (A36, Op. 13) (emphasis supplied) At this time Quinn knew that no surcharge had been imposed on those previous recipients, but he remained silent. (A37, Op. 14) Quinn therefore knew that Luce was promising, in effect, to pay nothing.

Plaintiff, in attempting to explain the District Court's finding on this point, states that "the District Court rejected the notion that Luce and Quinn agreed that Con Edison would pay only what the prior recipients paid, since the District Court found that in the July 24 conversation Quinn explained to Luce that the 200 MW reduction would be more expensive than the 450 MW reduction (Op. 14, A37)." (Pl. Br. 49) Although in its legal analysis the District Court resolved the estoppel issue against Con Edison, it did not repudiate its own finding of fact that Luce promised to pay only what the previous recipients paid. The District Court did find that Quinn told Luce that the 200 MW reduction would be more expensive than the 450 MW reduction, but the Court did not find that Quinn's statement was a rejection of Luce's position or, more importantly, that Luce agreed to pay the higher surcharge. Indeed, after Quinn stated that a reduction for Con Edison would be more expensive, Luce reiterated that it would not be appropriate for Con Edison to pay a surcharge different from that imposed on the prior recipients. (A864-A865)

In summary, the District Court correctly found that Luce promised to pay only what the previous recipients would pay. Quinn realized the import of this statement, and thus Con Edison never represented that it would unconditionally pay any AEC costs, without reference to payment by the recipients of the 450 MW. Without a representation there can be no estoppel.

Plaintiff also argues that Con Edison represented that it would pay a surcharge by accepting the 200 MW after July 27 without seeking confirmation of its costs. (Pl. Br. 49) Plaintiff here ignores the fact that Con Edison had already agreed to pay only what the others had paid and, having

assumed that such a charge would be reasonable,\* Con Edison was not obligated to ascertain its amount. When Con Edison learned the amount of the surcharge and that the previous recipients had paid none, it immediately asserted its original and only representation: it would pay on an equal basis.

Plaintiff contends that Luce informed the AEC only on September 30 that Con Edison absolutely would not pay a surcharge. (Pl. Br. 50-51) This misstates the facts. Luce's letter to Quinn of that date, sent in response to a letter dated September 22 from Quinn, again confirmed Con Edison's consistent position: "We stand willing to pay for the power released for our benefit on a basis of equal treatment with all others." (A1567, PX 28) Thus, it is not the case that Con Edison waited until September 30 to make a statement that rendered any later reliance unreasonable. Con Edison disclaimed an absolute obligation to pay the surcharge on July 24, August 6, August 20, September 1, September 11, and September 30, as well as several times in between. (A44, Op 21; A833-A835; A837-A841; A1018-A1019; A1567, PX 28)

**B. Plaintiff Did Not Rely On Any Representation  
By Con Edison In Releasing The 200 MW**

Perhaps the plainest flaw in plaintiff's estoppel theory is the lack of an element of reliance. As Con Edison argued in its main brief, the White House had already decided and directed the AEC to release the power to Con Edison on July 23, the day before Luce made his alleged representation to Quinn, regardless of whether Con Edison would

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\* Luce testified that he made his "equal treatment" statement to Quinn because Luce knew that the previous recipients would not have paid an unreasonable surcharge. (A881) Further, Con Edison officials did not inquire concerning the amount of the surcharge because on or about July 24, Arthur Hauspurg, then a Con Edison Vice-President, had been told by Ted Nagel of American Electric Power Service Corporation that there had been a 10 to 20% surcharge on a previous release of power by the AEC under the May 5 Plan. (A955-A956)



reimburse the AEC for its costs. (CE Br. 30-31) Plaintiff, apparently unable to explain how a representation made *after* its change of position could have caused that change of position, did not address this issue in its brief.

On July 23, the White House told the AEC "that the President had directed that the power be made available to Con Edison." (A31, A34, Op. 8, 11) On the same day, the White House publicly announced that the AEC "*will* make available several hundred megawatts of power" to Con Edison (A2064-A2065, DX R-3) (emphasis supplied), and the AEC staff acknowledged "that the decision to release the power had been taken from AEC's hands by the White House announcement." (A35, Op. 12) Con Edison's alleged representation did not occur until the next day, July 24, after plaintiff had already decided to release the power. There was not even a suggestion during this conversation that plaintiff might retract its decision if Con Edison did not agree to pay a surcharge.

Plaintiff is the United States, not the AEC alone, and any reliance forming an element of an estoppel must be reliance by the United States, not by the AEC alone. It is clear from the District Court's findings that the United States took the initiative in providing the 200 MW to Con Edison,\* that the United States made a firm, publicly announced decision on July 23 to release the power, and that the United States therefore could not have released the power in reliance upon representations alleged to have been made by Con Edison on July 24. Without an element of reliance, there can be no estoppel. *Freedman v. The Concordia Star*, 250 F.2d 867 (2d Cir. 1958); *Helvering v. Schine Chain Theatres*, 121 F.2d 948 (2d Cir. 1941).

### C. Any Reliance By Plaintiff Was Unreasonable

Even assuming that plaintiff did rely upon a representation that Con Edison would pay a surcharge, such reliance

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\* Plaintiff similarly took the initiative in releasing the 450 MW to the earlier recipients of power. See PX 5, A1522; DX A-3, A2034; PX 5, A1530-A1531.



was clearly unreasonable after August 6, when Con Edison unequivocally reasserted that it would pay only on an equal basis, and will not support an estoppel. *Twentieth Century-Fox Film Corp. v. National Publishers, Inc.*, 294 F.Supp. 10, 12 (S.D.N.Y. 1968).

Plaintiff contends that its reliance was reasonable because Con Edison never expressly stated that it would not pay a surcharge. (Pl. Br. 49-51) However, in view of the facts that previous recipients had paid nothing and that the AEC had no hope of receiving payment from them in the future, Con Edison's statement that it would pay on a basis equal with the others had the same effect as a direct refusal to pay.

**D. The Alleged Reliance Resulted In No Detriment To The AEC**

As demonstrated in Section VII of this Argument, plaintiff did not show that its alleged reliance resulted in any detriment. Without such a showing, there can be no recovery on an estoppel theory.

**E. There Was No Contract Between Plaintiff And Con Edison**

In order for plaintiff to recover on an estoppel theory, there must exist not only the requisite elements of an estoppel but also a valid contract against which Con Edison is estopped from asserting the statute of frauds. As demonstrated in Part III of this Argument, no valid contract arose from the July 24 conversation between Quinn and Luce, and thus any estoppel is without effect.

**III. There Existed No Contract, Enforceable Or Unenforceable, By Which Con Edison Unconditionally Agreed To Pay A Surcharge**

As Con Edison argued in its main brief, even if the statute of frauds is inapplicable or may not be asserted because of an estoppel, there existed no oral contract that

would render Con Edison liable for the surcharge as assessed by the AEC. (CE Br. 32-41) Con Edison contends (1) that Con Edison's alleged promise was without consideration, (2) that the July 24, 1970 telephone conversation between Luce and Quinn was too indefinite to constitute a binding contract, (3) that Con Edison did not accept the AEC's offer as made, and (4) that any contract, even if it existed, did not obligate Con Edison to pay the claimed surcharge. Plaintiff responded only on the issue of indefiniteness, and Con Edison respectfully submits that plaintiff's silence as to the others should result in a conclusion by this Court that no contract ever existed between the parties.

In response to Con Edison's assertion that the July 24, 1970 telephone conversation between Luce and Quinn was too indefinite to constitute a contract, plaintiff has mischaracterized some evidence and failed to respond to other relevant evidence supporting Con Edison's position. For example, plaintiff states that "Luce testified that he believed Con Edison had entered into a contract after the July 24th conversation . . . (Luce Cross A862)." (Pl. Br. 78) Luce's actual testimony was as follows:

"Isn't it the case, Mr. Luce, that you thought you had entered into an agreement with Mr. Quinn?"

"A Certainly we fleshed out the agreement with Mr. Quinn, that's correct. The offer to get the power came from Mr. Freeman and he referred me to Mr. Quinn for the details and we filled in the details with Mr. Quinn." (A862)

Luce's statement confirms that his July 24 conversation with Quinn was not a bargaining session from which a contract arose, but rather a follow-up to the Government's offer to supply power made and accepted on the previous day.\* In this regard, plaintiff has ignored Quinn's testi-

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\* In contrast to his July 24 conversation with Quinn, Luce's July 23 conversation with Freeman at the White House was quite definite: Freeman "asked if we wanted it [the power], and I [Luce] told him of course we did. . . ." (A803)



mony, as discussed in Con Edison's main brief on pages 36-37, that he called Con Edison on July 24 merely to "inform Luce that the Commission had determined that it would be able to reduce its power consumption by an additional 200 megawatts . . . ." (A92, A307-A-308)

Plaintiff also asserts, without citation to the record, that "Luce did not care about the actual amount of the surcharge and intended to enter into a contract to reimburse the AEC for its costs without these costs being first determined." (Pl. Br. 78) To say that Luce "did not care" about the amount of the surcharge is wholly inconsistent with the District Court's finding that Luce conditioned payment upon equal treatment with other recipients of power. He expressly stated this condition in an effort to avoid being charged an "outlandish" amount. (A881) Having thus assured that the surcharge would be reasonable, Luce and others at Con Edison did not inquire immediately as to its exact amount—a fact to which plaintiff attaches some significance. Yet Con Edison had no reason to ascertain the amount because it had learned from a presumably reliable source that the surcharge would be relatively small. (A995-A956) Furthermore, a small surcharge was consistent with the industry practice of charging "cost plus ten percent" for emergency power. (CE Br. 25-26) (A936, A940-A942) Con Edison's failure to inquire was reasonable and natural under the circumstances.

Plaintiff cites authority for the general proposition that a specific price term is unnecessary in order to form a contract, and concludes that it was sufficient that Luce agreed to pay the AEC's costs. (Pl. Br. 76-78) Again, this ignores the fact that Luce agreed to pay the AEC's costs only on the same basis that previous recipients had paid them. Just as important, Quinn did not state a "*practicable, objective* method for determining [the] price or compensation" (emphasis supplied), something required in plaintiff's quotation from Professor Corbin. (Pl. Br. 77) On July 24, Quinn was ignorant of the possible magnitude of the surcharge and did not even offer Luce an estimate.



(A37, Op. 14) According to plaintiff and the District Court, determination of the surcharge was left entirely in the hands of the AEC—hardly a “practicable, objective” method for determining the price. On the contrary, the method used by the AEC for calculating the surcharge was wholly subjective. As the evidence at trial indicated, there are many different approaches and methodologies for determining “costs” in these circumstances, including “efficiency losses,” “production losses,” “average surcharge,” “power surcharge,” “threshold method,” *et cetera* (See CE Br. 89-99), and plaintiff itself has computed damages according to many of these methods. (See CE Br. 78n.) In addition, the terms themselves are susceptible of various interpretations. The AEC sought to recover the cost of such items as maintenance of service roads and security guard service for buildings not even connected with its gaseous diffusion operations. (A1600-A1601, PX 41) On July 24, Luce could not have suspected that costs of this nature would be included in what Quinn had characterized only generally as “efficiency” losses. (A37, Op. 14)\*

In summary, the July 24 conversation did not contain a definite and fair mode of determining price.\*\* For this reason and for other reasons previously discussed (CE Br. 36-41), it must be concluded that the conversation was too vague to form a contract.

#### **IV. Plaintiff Has Denied Con Edison Equal Protection Of The Laws**

Plaintiff has failed to demonstrate that its discrimination against Con Edison is permissible under the Equal Protection Clause of the Fourteenth Amendment.

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\* This finding was based on Luce's testimony. Quinn's testimony is even less definite, *i.e.*, that he spoke to Luce only vaguely of “costs” and mentioned equipment shutdowns as the only example. (A93, A308, A313)

\*\* Moreover, there was hardly a “defined or stated price” under Uniform Commercial Code § 1-206. See Section VIII, *infra*.

Plaintiff appears to believe that Con Edison has asked this Court to examine the May 5 Plan with the "strict scrutiny" required when a case involves a suspect classification or a fundamental right. (Pl. Br. 52-53) Con Edison, however, has expressly relied not upon the strict scrutiny test but upon the traditional test, recognized by plaintiff as applicable in this case (Pl. Br. 52-53), requiring that a discriminatory classification must have "a fair and substantial relation to the object of the legislation." (CE Br. 64-65, 68-69)

Applying this test, plaintiff asserts that the AEC's actions were not arbitrary and "were intended to promote a legitimate end of the AEC, i.e., preventing production losses while providing assistance to a public utility." (Pl. Br. 53) This analysis is defective as to the facts and the applicable law.

First, Con Edison has established in its main brief (CE Br. 65-68) that the AEC staff knew long before the genesis of the May 5 Plan that the AEC would incur production losses in the event of any reduction in its consumption of power. When the first release was made pursuant to the May 5 Plan, the AEC staff made no attempt to impose a surcharge on the utilities that received the power, and their attempt to recover those losses only with respect to the reduction for Con Edison was therefore arbitrary. Plaintiff made no attempt to contradict the evidence on this issue, one upon which this Court may make its own findings of fact. *Guzick v. Drebus*, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1974). See *Brookhart v. Janis*, 384 U.S. 1, 4n.4 (1966).

Second, plaintiff's alleged "rational basis" is insufficient to justify the discrimination against Con Edison. Although prevention of production losses might form a "rational basis" for plaintiff's imposition of a surcharge on *all* recipients of power under the May 5 Plan, it does not form a rational basis for plaintiff's discrimination in assessing a surcharge only against Con Edison. Moreover, the tradi-

tional equal protection test, even as plaintiff states it, requires that a classification must rest upon a ground of difference that has a fair and substantial relation to the object of the government action—in this case, the provision of emergency power under the May 5 Plan. *Johnson v. Robison*, 415 U.S. 361 (1974); *Railway Express Agency v. New York*, 336 U.S. 106 (1949). The discrimination is not justified simply because it served a purpose of the AEC that is unrelated to the assistance program. With respect to the May 5 Plan, there was no difference between Con Edison and the other recipients of emergency power. Plaintiff's discrimination between them is therefore constitutionally impermissible. In any event, a mere savings of costs cannot justify an otherwise invidious classification. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 263 (1974). Although it may be permissible for the AEC staff to prevent production losses, it must do so in a way that does not draw irrational distinctions between similarly situated persons.

Plaintiff cites a line of cases for the proposition that gratuitous benefits conferred by the Government do not create vested rights and may be modified or withdrawn at any time. (Pl. Br. 53) These cases involved various veterans or other pension-type benefits that had been modified or withdrawn by new legislation. In each case the issue was the validity of the Congressional action. There were no allegations, as here, that the Government had arbitrarily discriminated in administering a program of assistance. There was also a finding in each case that the withdrawal of benefits was substantially related to a permissible objective. Because of plaintiff's arbitrary discrimination, no such finding is possible in this case. Moreover, while the pensions involved in those cases were gratuitous, Con Edison paid market value for the power it received under the May 5 Plan.

Plaintiff also objects that Con Edison's equal protection claim was not raised in the District Court. (Pl. Br. 54)



Although not couched in equal protection terms, an assertion of unequal treatment by the Government lay at the heart of Con Edison's defense below. As a result, both parties fully explored the nature of and the reasons for the discrimination, and plaintiff should not be permitted now to claim that it was not aware of this key issue.\* In the absence of some specific claim of prejudice to the opposing party and in the interests of justice, a reviewing court will consider a point first raised on appeal. *Krause v. Sacramento Inn*, 479 F.2d 988 (9th Cir. 1973) (equal protection issue raised for first time on appeal); *Green v. Brown*, 398 F.2d 1006 (2d Cir. 1968); *United States v. Vater*, 259 F.2d 667 (2d Cir. 1958); *N. Y., N. H. & H. Ry. Co. v. Reconstruction Finance Corp.*, 180 F.2d 241 (2d Cir. 1950). Because the underlying facts were fully developed and because no prejudice could result to plaintiff, Con Edison respectfully submits that this Court should hear its equal protection claim.

#### **V. Plaintiff Is Estopped By Its Inequitable Conduct From Seeking A Surcharge From Con Edison**

Plaintiff's brief contained no response to this argument made by Con Edison in its main brief. (CE Br. 74-75) Con Edison respectfully suggests that, in view of plaintiff's silence on this issue, it should be resolved in Con Edison's favor.

#### **VI. Because It Sought Equity With Unclean Hands, Plaintiff Should Not Have Been Afforded Equitable Relief**

On the basis of plaintiff's discriminatory treatment of Con Edison and its intentional concealment of this discrimination, Con Edison has asked this Court to rule that plain-

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\* The District Court requested post-trial briefs only upon the issue of pre-judgment interest. (A1307) When plaintiff's brief treated certain issues of liability as well, Con Edison received permission to file a responsive brief on those issues. However, the District Court did not request formal post-trial briefs where the discrimination issue might have been raised in equal protection terms.

tiff should not have been granted the purely equitable remedies of estoppel and restitution. (CE Br. 71-73) Plaintiff has made no attempt to justify its actions that stand as the basis for Con Edison's request, and in fact does not address this issue at all. Since plaintiff has failed to respond to this issue, it should be resolved in Con Edison's favor.

**VII. Plaintiff Has Not Shown That It Suffered Any Actual Damages Or That The Methodology By Which It Attempted To Do So Accurately Showed The Actual Economic Impact Of The 200 MW Reduction**

The District Court awarded damages on the basis of plaintiff's alleged "losses" related to the 200 MW reduction. As Con Edison has elsewhere urged,\* if there is any liability, damages must be measured on the basis of any alleged "benefit" to Con Edison. However, as indicated in Con Edison's main brief, even were damages to be awarded on the basis of plaintiff's "losses," plaintiff did not prove such damages at trial and the methodology by which plaintiff attempted to prove such damages did not accurately portray the actual economic impact of the 200 MW reduction. (CE Br. 76-99) Plaintiff's arguments regarding damages largely misconstrue—and do not successfully rebut—Con Edison's argument.

Essentially, Con Edison has argued that the methodology used by plaintiff to calculate its alleged "losses," embodied in PX 41, does not represent the actual economic impact of the 200 MW reduction, and thus does not accurately portray plaintiff's losses. Con Edison has shown that plaintiff's methodology does not lead to an accurate or appropriate measure of "loss" for a multiplicity of reasons. (CE Br. 80-87, 89-99) Plaintiff appears to misconstrue the thrust of Con Edison's arguments by contending that since the calculations in PX 41 were arith-

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\* See Con Edison's main brief at pages 46-54 and section I.C. of this Argument.

metically correct, it follows that the "bottom line" of PX 41 necessarily accurately reflects the AEC's actual losses. That is not so. If one's basic methodology is faulty, all the accurate arithmetic in the world will not validate the result.\*

**A. Plaintiff Has Suffered No Actual Loss Since All The Costs It Incurs In The Uranium Enrichment Program Are Automatically Passed On To Its Enrichment Customers**

In its brief plaintiff does not dispute that most of the costs incurred by the AEC as a result of the 200 MW reduction have already been passed on to the customers of its enrichment service, as required by statute. (CE Br. 80-85; Pl. Br. 59-62) Nor does plaintiff contest the conclusion that as a result of this "passing on" it has not been damaged in the amount alleged. Instead, plaintiff seeks to distinguish two of the several cases and other authorities cited by Con Edison for the universally accepted principle that plaintiff may not recover damages in excess of the actual damage sustained. (CE Br. 80-84)

Plaintiff's own analysis of *Hanover Shoe, Inc. v. United States*, 392 U.S. 481 (1968), makes it clear that a "passing-on" defense is appropriate in this case. Under the particular facts of *Hanover*, the Court refused to recognize the defense because a wide range of factors—other than the cost charged by an overcharging seller—influences a company's pricing policies. 392 U.S. at 492-493. (Pl. Br. 60) In this case, there is only one factor—cost—which by law determines the AEC's pricing policies. There is no doubt that *all* AEC production costs, and *only* those costs, are reflected in its prices for separative work. Thus, the exception in *Hanover*, where it is "easy to prove that [a plaintiff] has not been damaged," is readily applicable to plaintiff. In illustrating this exception the Court referred to a "pre-existing cost-plus contract" which, as the Court recently

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\* In addition, Con Edison urges that PX 41 was erroneously admitted into evidence. See Con Edison's main brief at pages 87-88 and section VII.C. of this Argument.



noted, "makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser." *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 732 n. 12 (1977). The AEC's statutory passing-on obligation has the same effect as a cost-plus contract: it makes certain that the AEC's cost are passed on to its customers.\*

Plaintiff also purports to distinguish *Plimpton Mfg. Co. v. United States*, 15 Ct. Cl. 14 (1897), where the court precluded recovery by the Post Office because the alleged damages had been passed on, pursuant to statute, to its customers. Plaintiff's only comment on the case is that

"... *Plimpton* does not establish a hard and fast principal [sic] that a statutory provision requiring costs prohibits recovery where a genuine loss can be demonstrated. Indeed, in the present case plaintiff firmly established its loss and should therefore be entitled to recovery." (Pl. Br. 62)

These statements simply contradict the holding of *Plimpton*, where the court unqualifiedly stated that there was no "genuine loss" where a statute required the government to pass on its costs. 15 Ct. Cl. at 21. The existence of a statute requiring the passing on of costs excludes the possibility of establishing a loss.

Plaintiff also states that any recovery here will be utilized to "equalize its costs." (Pl. Br. 62) However, plain-

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\* Plaintiff also contends that the alleged "losses" connected with the 200 MW reduction might somehow have affected the demand for enriched uranium and that this somehow removes the present case from the logic of the cost-plus example discussed in *Hanover Shoe* and *Illinois Brick*. Plaintiff's contention is without merit. The significance of "demand" as mentioned in *Illinois Brick* is only that the complexities of supply and demand normally make determination of "passing on" too difficult to be ascertained by a court. 431 U.S. at 736. In contrast, the statute here simply and automatically assures "passing on" regardless of demand. Moreover, since the United States Government is the only supplier of enriched uranium to utilities, it has essentially a captive market which cannot turn to another source if the United States raises the price.

tiff has not specifically responded to Con Edison's rebuttal of this conclusion. (CE Br. 84-85)

In summary, the District Court erroneously rejected the principle of *Plimpton* and other cases that plaintiff may not recover damages where it has effectively recovered those damages elsewhere.

**B. Plaintiff Has Suffered No Actual Damages Since Costs Associated With The 200 MW Reduction Were Covered By Its 15% Contingency Factor**

As shown in Con Edison's main brief, the calculation of the price charged by the AEC for its uranium enrichment service includes a 15% contingency factor, and the magnitude of such a factor, \$4.16 per SWU, more than amply covers the magnitude of the alleged effect of the 200 MW reduction, which plaintiff's own witness, Eugene Schmidt, testified was about \$0.015 per SWU. (CE Br. 85-86) While the District Court concluded that that factor did not cover "costs" such as allegedly associated with the 200 MW reduction, this conclusion was based upon the testimony of a witness who was not familiar with this cost factor or the pricing of SWUs and is against the clear weight of the evidence.

Plaintiff, in support of the Court's conclusion, cites the following testimony of George Quinn:

"I do not *believe* that it was intended to cover production interruptions. I *think* the *primary* purpose, as I *recall* was to provide for some degree of escalation of costs without requiring a frequent change in charge."  
(A526) (emphasis supplied)

Quinn's testimony is very uncertain on this point, as would be expected from a person whose functions and experience at the AEC were in the production, not the budgetary and accounting, areas. (A76-A77) Thus, for example, the AEC's surcharge calculations were prepared not by Quinn



or his staff but rather by the AEC's accounting staff in the Office of the Controller. (A100-A101; A336-A339) Indeed, the fact that Quinn did not really understand the surcharge calculations is indicated by his concession at trial that there were obvious errors in the July 28, 1970 calculations\* which he at that time did not discover or discuss. (A340-A348) In any event, Quinn was proven to be wrong in his "belief" by the clear and unambiguous testimony of Schmidt, plaintiff's witness, who is a staff accountant with ERDA\*\* and whose duties include "the pricing of separative work units." (A702) Schmidt specifically testified as follows:

"Q Doesn't the contingency factor cover such items as unforeseen costs and production interruption, uncertainty of future costs of money and similar uncertainties and unforeseen events?

"A They include such items, yes." (A732-A733)

The District Court appears to have overlooked this crucial testimony. (A51, Op 28)

Dr. Geller, who was qualified as an expert, *inter alia*, on the method of the AEC's charges for separative work units (A1060-A1061), similarly testified that the contingency factor "includes essentially any variation from the assumptions they've made in deriving the base cost" and that the costs associated with the 200 MW reduction fall within a specific category of the contingency factor designated "altered mode of operation of the plants." (A1137)

In the face of this testimony by Geller and Schmidt, the equivocal testimony of a witness whose duties and experience lay in other areas will not support the conclusion of the District Court. Moreover, for plaintiff to argue that

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\* *E.g.*, erroneous length of time for the reduction and erroneous statement of power levels.

\*\* Plaintiff erroneously refers to Schmidt as a "management auditor" with ERDA; that was his job with his previous employer, the General Accounting Office ("GAO"). (Pl. Br. 63; A701)



the contingency factor is inapplicable because the AEC "did not realize the full effect on production" (Pl. Br. 63) ignores the very purpose of a factor designed to compensate for costs that are not foreseeable or "realizable" at the time prices are calculated.

### **C. PX 41 Was Erroneously Admitted Into Evidence**

As argued in Con Edison's initial brief (CE Br. 87-88), the document by which plaintiff calculated damages, PX 41, was erroneously admitted into evidence. Some of the most crucial data contained in PX 41, *e.g.*, the estimates of separative capacities at different power levels (the "power efficiency" at different power levels) (Appendix 4 to PX 41, A1602), upon which data the "bottom line" of PX 41 depends, were not data prepared by the AEC. That data came from documents of Union Carbide, characterized by plaintiff as a "private contractor." (Pl. Br. 5n.) Plaintiff's argument that the exhibit was properly introduced into evidence because the man who physically prepared PX 41 was called to testify is without merit. (Pl. Br. 57n.) By plaintiff's reasoning, the substance of any document could be received in evidence simply by having a person transcribe data from that document onto a second document and then testify that he prepared the latter. Plaintiff's reliance upon Rule 1006 of the Federal Rules of Evidence (Pl. Br. 57n.) is misplaced. That rule applies only where the underlying documents would themselves be admissible. As demonstrated by the District Court's proper exclusion of the source document for Appendix 4 of PX 41, no proper foundation for this source material of PX 41 and hence for PX 41 itself was laid. The information in PX 41 rested in great measure upon documents which were not plaintiff's. This information was clearly inadmissible hearsay, and no exception to the general hearsay exclusionary rule, Fed. R. Evid. 802, was established by plaintiff. For example, plaintiff did not establish that the document fell within the exception contained in Fed. R. Evid. 803(6) since, *inter alia*, there was no proper witness as to the non-AEC documents

which were the source of so much of the data contained in PX 41.\*

**D. The Methodology Of PX 41 Does Not In Fact Represent Actual Damages Suffered By Plaintiff**

As shown in Con Edison's main brief (Point IX.F.), the methodology of PX 41 fails to take into account many factors which must be considered in evaluating the actual economic impact upon the AEC of the 200 MW reduction. In order to show the magnitude of error caused by plaintiff's failure to do so, Con Edison introduced into evidence various alternative methodologies which had been prepared by Con Edison's expert, Dr. Leonard Geller. Plaintiff's attack upon these methodologies reflects an apparent confusion as to their basis and importance.\*\*

In preparing his alternative calculations, Dr. Geller used, to the maximum extent possible, the data set forth in PX 41. (A2465, DX Y-9; A2424, DX U-9, A2464, DX X-9) He did this for two reasons. First, the maximum use of plaintiff's own data highlighted the substantive effect al-

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\* PX 33 (A1576-A1585), the rejected exhibit which was the source of the information used by Sullivan in Appendix 4 of PX 41, was an internal Union Carbide document dated January 2, 1970, purportedly showing performance curves at the gaseous diffusion plants at different power levels. Data from Table 1 of PX 33 (A1578) were transferred to PX 41. (A1602)

\*\* Plaintiff claims that Dr. Geller's testimony that \$1.5 million today would not be enough to produce 126,000 SWUs supports its conclusion that PX 41 properly shows its damages. That is not true. Plaintiff calculated its damages on a theory of increased per unit cost to produce the SWUs actually produced during the 200 MW reduction. The fact that 126,000 SWUs were not produced (which otherwise would have been produced) is significant under plaintiff's methodology only to the extent that it results in higher per unit cost of the SWUs actually produced. As shown in Con Edison's main brief, the only significance of the "lost" SWUs would be at such time in the future when, had they been in existence, they would be sold. Since the preproduction inventory has steadily risen since 1970, that has not occurred yet and might never happen—or might happen so far in the future that the discounted present impact would be negligible.



ternate methodologies have upon the "bottom line." Second, Dr. Geller had no choice, in view of the fact that plaintiff, which was in possession of the records and underlying data, objected to answering interrogatories which would have eliminated the need for some of what plaintiff now characterizes as "estimates" and also consistently delayed in producing documentation underlying its calculations.\*

Plaintiff's specific critiques of the various alternatives prepared by Dr. Geller show a pervasive misunderstanding.

*"Power Efficiency" Loss Methodology:* (A2424, DX U-9). Plaintiff's sole comment upon this approach, that it "suggests that an additional \$125,092 should have been charged" (Pl. Br. 65), shows a lack of understanding. Dr. Geller, in the power efficiency loss methodology as described

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\*Plaintiff answered defendant's First Set Interrogatories (served in August 1976) in March, 1977, without any consent or order for such late service, shortly after the District Court sent a notice to counsel putting the case on the 48-hour Ready for Trial Calendar. Memorandum to Attorneys from Deputy Courtroom Clerk, dated February 17, 1977. The answers included a calculation of damages based upon what plaintiff claimed was "actual costs"—the precursor to PX 41. (See A1386) In order, *inter alia*, to obtain figures based upon what plaintiff claims are actual data for other methodologies, including the "average surcharge" method, Con Edison then served its Second Set Interrogatories. (A1497-A1499) Plaintiff sought a protective order to insulate it from further discovery, including the above-mentioned interrogatories. Order to Show Cause of Plaintiff, filed March 23, 1977. In particular, plaintiff asserted that computation under these alternative methodologies would take mammoth man-hours, *id.*, Annexed Affidavit of Walter Scarbrough. The Magistrate, to whom the matter had been referred by the District Court, granted plaintiff's motion in large part and, in particular, as to the calculation of damages under alternative methodologies. (A1503-A1506, Order of Magistrate Bernikow, Apr. 7, 1977) Those documents which defendant did receive which purported to underlie at least some of the data in the precursor to PX 41 were received on April 12, 1977, under the Magistrate's order—effectively too late for Dr. Geller to make a detailed analysis of them in view of the necessity of preparing his alternative methodology calculations. In the circumstances, it ill becomes plaintiff to criticize Con Edison because Con Edison was thereby forced to some degree to rely upon "estimates".



in Con Edison's brief (CE Br. 90-91), used the common industry understanding of "efficiency" as meaning "power efficiency," and used the data from PX 41, including power use, power cost, and SWU production. However, he excluded from his calculations extraneous costs in PX 41, such as added factor and fixed operating costs, which simply play no role whatever in calculating power efficiency losses. The resulting amount, \$125,092, plus \$24,000 for extraordinary maintenance, is thus already included within PX 41.

*Power Surcharge Methodology.* As discussed in Con Edison's main brief at pages 91-93, calculation of a surcharge in terms of the cost of additional power needed in 1970 to make up the lost production would have been a much less costly, yet equally effective, way of obviating plaintiff's alleged losses. Plaintiff admits that the AEC received such power surcharges to obviate losses incidental to power reductions both in January and October 1970. (A2469) These power reductions were at levels similar to the 450 MW and 200 MW reductions in the summer of 1970. Yet the surcharges connected with these reductions amounted only to from 10% to 20% of the cost of the power itself.

The two approaches, power premium and monetary surcharge, are very much alike and both are intended to compensate for "production losses"\* occasioned by power reductions. As the testimony of George Quinn cited by plaintiff indicates (Pl. Br. 7), a *power* surcharge and a *monetary* surcharge are alternate ways of handling the same "losses" which result (in the view of plaintiff) from a power reduction. The evidence in the record that both methodologies eliminate the same production losses is overwhelming. Thus, the January 1970 reduction of 350 MW, from a power level of 1900 MW to 1550 MW, (A2321-A2322, DX D-8; A1879-A1882, DX T), was conceded by plaintiff

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\* Plaintiff in its brief defines "production losses" as being "calculated by reference to fixed costs and added factor costs" (Pl. Br. 6), i.e., the approach of PX 41, the basis for its calculation of damages.

to be "similar to the one being litigated in this action" (Plaintiff's Answer to First Set Interrogatories No. 10, A2467, DX C-11). In addition to return of the reduced power itself, the AEC required TVA to provide, at a later date, an additional amount of power, equal to 10.4% of the total power reduced. (A2321-A2322, DX D-8) Plaintiff has admitted that the reason for this power surcharge was "to compensate the AEC for production losses sustained as a result of this emergency reduction" (Plaintiff's Answer to First Set Interrogatories No. 10, A2469, DX C-11), i.e., the very losses, "production losses," which plaintiff in its brief contends are the basis for its damages. Similarly, at the time the 200 MW release to Con Edison was ending, October 1, 1970, TVA requested that 150 MW of power be released to it. Thus, in a very real respect, this reduction may be viewed as a partial continuation of the 200 MW release—but for TVA. This reduction lasted from October 1 through October 31, 1970, and TVA paid a power premium of 14%. (A2179-A2180; Plaintiff's Answer to Second Set Interrogatories No. 1, p. 4) Plaintiff admitted that this power surcharge was intended to "offset AEC's production losses and costs." (A2179)

The essential similarity of the two methods of offsetting production losses is further revealed by an analysis of how they operate in practice. If power is reduced, fewer SWUs are produced, and the per unit cost of producing the fewer SWUs actually produced increases. The increase in per unit production cost forms the basis of what plaintiff claims are production losses. The power surcharge and monetary surcharge methods are simply two ways to offset production losses. In the power surcharge method, the AEC is given additional power (a "power surcharge"), in order to increase SWU production to what it would have been absent the power reduction; by equalizing production (and since the AEC's total costs remain constant) this surcharge assures that the per unit production cost also remains the same. Thus, it avoids the production losses here claimed, which are calculated on the basis of an increase in per unit production cost. The monetary surcharge does not



equalize production (*i.e.*, it does not restore SWU production to what it would have been absent the power reduction) but merely offsets financially the increase in the per unit production cost, *i.e.*, offsets production losses. The evidence is clear, in view of the January 1970 and October 1970 reductions, that the former method is cheaper and accomplishes the same goal (indeed, it should be preferable since it also increases SWU production to what it would have been absent the power reduction). In such circumstances, damages, if any, should be computed using the method less costly to defendant.\* The Court's conclusions (1) that there was no reason to conclude that the January reduction was comparable to the 200 MW (Op. 50 n.1, A73) and (2) that there was no evidence that the 14 percent power surcharge on the October 1970 reduction was comparable to the 200 MW reduction surcharge (Op. 52n.12, A75) are thus clearly erroneous.

Besides showing that a power premium is a cheaper method of offsetting the claimed production losses than a monetary surcharge, the January 1970 reduction is convincing proof that the AEC, despite its protestations at trial, clearly understood long prior to the 200 MW reduction the fact that power reductions caused production losses. Thus, plaintiff's attempt to justify not seeking a surcharge with respect to the 450 MW but seeking one from Con Edison—in effect discriminating against Con Edison—lacks merit. If the effect of the January 350 MW reduction was so great as to warrant the AEC's seeking of a power surcharge from TVA to offset production losses, clearly the prospect of a 450 MW reduction, which reduced the power at the plants to the same level as in the January reduction, *i.e.*, 1550 MW, should similarly have caused the AEC to recognize that there would be production losses and accordingly to institute a *uniform* policy which would have applied to the anti-

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\* There is a suggestion, in the Quinn testimony cited by plaintiff (A514-A515), that a power premium approach was *not* used for the 200 MW reduction because that reduction straddled two fiscal years. If so, that is a rather lame rationale for seeking as actual damages from Con Edison a million or so dollars more than a power premium would amount to.



pated 450 MW reduction (as well as to the 200 MW reduction). The AEC's awareness of production losses is also shown by the fact that in the 1960's the power levels at the plants had dropped from 6,000 MW to 2,000 MW. Surely such reduction made the AEC aware of the effects of power reductions. (Op. 73 n.2, A73; A152-A153, A155-A157)

*The "Threshold" Surcharge Methodology:* (A2465, DX Y-9). This method is premised upon the equitable principle that, since Con Edison from the outset agreed to pay *only* to the extent recipients of the 450 MW reduction were paying and since the AEC never charged those recipients anything, at the very least plaintiff should not be allowed to recover that portion of the claimed surcharge which represents the surcharge which would have been charged the recipients of the 450 MW reduction. Plaintiff wholly misconstrues the basis of this approach.

*Price Planning Methodology:* (A2425, DX V-9). Plaintiff makes no real attempt to argue away the price planning methodology approach. This approach, as discussed in Con Edison's main brief (CE Br. 94-97), illustrates the time impact upon the "losses" claimed by plaintiff, an important factor ignored by plaintiff in PX 41. It cannot be over-emphasized in this regard that plaintiff's own witness, Eugene Schmidt, who was presented as an accountant with ERDA whose duties involve the preparation of ERDA's financial statements and the pricing of separative work units (A702-A703), admitted that the "losses" in PX 41 were not all actually suffered by plaintiff in fiscal year 1971; rather the 1971 impact of the 200 MW reduction on the AEC's deficit, according to Schmidt, was only about \$700,000\* (A756; A767; A793; PX 52, A1814, A1815) and even that amount was only a bookkeeping result and was not actually paid out to anyone. (A788-A790) Plaintiff never presented any evidence to show when, if ever, the impact of the remainder of the PX 41 "bottom line" would actually have been felt by the AEC.

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\* \$18,654,000 — \$17,925,000 — \$729,000.

*Average Surcharge Methodology:* (A2464, DX X-9). Plaintiff is demonstrably wrong in arguing that Dr. Geller in calculating the "average surcharge" (i.e., averaging the concurrent effects of the 450 MW and the 200 MW reductions) used "estimates" in contradistinction to the alleged "actual costs" in PX 41 and that such "actual costs" were significantly higher than those used in Dr. Geller's calculation. (Pl. Br. 65) Plaintiff's citations relate to discussions of exhibits entirely different from the exhibit embodying the average surcharge methodology, i.e., DX X-9, A2464; instead they relate to discussions of DX V-9 and DX W-9, and have nothing at all to do with the average surcharge methodology.

In fact, as indicated in Con Edison's main brief at pages 97-99, the average surcharge method was calculated by Dr. Geller using the data contained in PX 41, and is essentially the same approach which ERDA now uses to calculate its prospective surcharge rate, i.e., a flat rate which all parties taking a power release simultaneously pay regardless of whose request comes first. This average surcharge method much more closely tracks ERDA's present methodology than PX 41. Using this approach, Dr. Geller calculated an average surcharge (for the simultaneous 450 MW and 200 MW reductions) at \$1,319,257. It should be noted that, despite plaintiff's present criticism of Dr. Geller's "average" methodology, the AEC's Director of Finance in February 1972 specifically recommended this averaging method for the 200 MW reduction here in issue over the methodology ultimately reflected in PX 41 because it was "more equitable" to charge the same rate for all simultaneous power reductions and since this averaging method more closely approximated plaintiff's current method of determining surcharges on present power reductions. (A2221-A2222, DX D-6)

#### **VIII. The District Court Properly Dismissed Count One As Barred By The Statute Of Frauds**

At the end of plaintiff's case-in-chief, the District Court properly ruled that the statute of frauds in Section 1-206

of the Uniform Commercial Code renders unenforceable the alleged contract between plaintiff and Con Edison. (A796-A797)

The District Court had determined prior to trial that Section 1-206 is applicable here either as state law or as federal law under the doctrine of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). (A1319-A1321) Finding that the "sale by plaintiff to defendant clearly was the transfer of a contract right," and that Section 1-206 applies to such sales, the Court concluded that any alleged contract was barred by the statute of frauds and granted summary judgment for Con Edison on Count One. (A1321) Upon reconsideration of its ruling, the Court adhered to its earlier position on choice of law, rejecting plaintiff's contention that 31 U.S.C. § 200(a) is an applicable statute of frauds, but reinstated Count One, finding an issue of fact as to whether the AEC had transferred a contract right to Con Edison or simply relinquished a contract right. (A1329-A1330) After hearing plaintiff's evidence at trial, the Court concluded that there had been a transfer and directed a verdict for defendant as to Count One. (A796-A797) Con Edison submits that the District Court was correct in its conclusions and in the reasoning behind them.

**A. The District Court Properly Looked To Section 1-206 Of The Uniform Commercial Code As The Applicable Statute Of Frauds**

**1. STATE LAW APPLIES**

Plaintiff argues that *Clearfield Trust Co. v. United States, supra*, dictates that federal substantive law is applicable in this case. (Pl. Br. 71) The District Court properly rejected this contention on the ground that *Clearfield* applies only where the application of federal law is necessary for uniformity in numerous transactions, not to the "highly unique" contract alleged by plaintiff. (A1319-A1320)



In *Clearfield*, the Supreme Court held that the rights and duties of the United States on commercial paper which it issues are governed by federal rather than local law. Because the government issued notes to persons in many jurisdictions, the Court was concerned with establishing a uniform rule for all obligations of the United States. The *Clearfield* doctrine is thus limited to situations where uniformity is highly desirable, and therefore has no application to the unprecedented, singular contract alleged by the AEC.

Plaintiff takes a position that a "federal interest" exists and therefore federal law applies whenever the United States "enters into a contract with a private entity." (Pl. Br. 72) However, none of the cases cited by plaintiff either directly or indirectly supports that position.\*

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\* In *United States v. Allegheny County*, 322 U.S. 174 (1944), the Court held that a state tax rule under which movable machinery was part of the realty of a manufacturer could not be applied so as to subject a manufacturer renting the machinery from the United States to such an enhancement of the value of its realty. The case thus turned on the liability of property of the United States to local taxes, an issue which calls for a uniform result in all states and falls within the *Clearfield* rationale. Other cases cited by plaintiff are similarly not on point. *United States v. 93,970 Acres*, 360 U.S. 328 (1959), involved the validity of the Government's revocation of an airfield lease held by a private operator who argued that Illinois law applied. The Court identified condemnation, not the mere making of a contract, as an essential government function and on that basis applied federal law. In *United States v. Eastern Airlines*, 366 F.2d 316 (2d Cir. 1960), which involved the Navy's lease of aircraft to defendant, the narrow issue was whether the district court had erred in requiring defendant to pay prejudgment interest on the judgment, an issue this Court resolved under federal law. With respect to the lease itself, the *Clearfield* issue was never addressed. The Government's suit for payment of storage charges in *United States v. L. N. White Co.*, 359 F.2d 703 (2d Cir. 1966), was based upon an Act of Congress specifically authorizing suit by the Commodity Credit Corporation, and this Court, in a footnote, explained that an accord and satisfaction defense should therefore be evaluated under federal law. In *Cargill, Inc. v. Commodity Credit Corp.*, 275 F.2d 745 (2d Cir. 1960), this Court, citing *Clearfield* and without further elaboration, held that CCC's counterclaim for damages to grain was governed by federal law. As in the other cases, there was no reference to a federal interest arising out of the existence of a government contract.

The sole test for determining the applicability of federal law is whether there exists a need for national uniformity. An interest in such uniformity is the only "federal interest" that dictates application of federal law. As the Supreme Court stated in *United States v. Yazell*, 382 U.S. 341 (1966), its "decision applying 'federal law' to supersede state law typically relate to programs and actions which by their nature are and must be uniform in character throughout the Nation." 382 U.S. at 354. In applying Texas law to a mortgage securing a federal disaster loan, the *Yazell* Court "emphasized that this was a custom-made, hand-tailored, specifically negotiated transaction. It was not a nationwide act of the Federal Government, emanating in a single form from a single source." 382 U.S. at 347-48. Mr. Justice Fortas further observed: "None of the cases in which this Court has devised and applied a federal principle of law superseding state law involved an issue arising from an individually negotiated contract." 382 U.S. at 353.

It is difficult to conceive of a more "custom-made" contract than that alleged in the premises. For this reason, it would go far beyond the principle of *Clearfield* and the other cases where courts have fashioned a federal rule to do so here. Plaintiff's "generalities as to the paramountcy of the federal interests do not lead inevitably to the result the Government seeks." *United States v. Yazell, supra* at 349. "[I]n many situations . . . interests and legal relations of the United States are determined by application of state law, where Congress has not acted specifically." *United States v. Standard Oil Co.*, 332 U.S. 301, 308 (1947). The District Court properly recognized the present situation as one where the state law is determinative.

## 2. THE UNIFORM COMMERCIAL CODE IS THE APPLICABLE FEDERAL LAW

Assuming *arguendo* that this case calls for application of a uniform federal law, it is clear, as the District Court

found, that the Uniform Commercial Code is part of that body of federal law. The District Court followed the principle established by this Court in *United States v. Wegematic Corporation*, 360 F.2d 674, 676 (2d Cir. 1966):

"We find persuasive the defendant's suggestion of looking to the Uniform Commercial Code as a source for the 'federal' law of sales. The Code has been adopted by Congress for the District of Columbia, 77 Stat. 630 (1963), has been enacted in over forty states, and is thus well on its way to becoming a truly national law of commerce. . . . When the states have gone so far in achieving the desirable goal of a uniform law governing commercial transactions, it would be a distinct disservice to insist on a different one for the segment of commerce, important, but still small in relation to the total, consisting of transactions with the United States."

*Accord, In Re Yale Express Systems, Inc.*, 370 F.2d 433, 437 (2d Cir. 1966); *United States v. First National Bank in Ogallala, Nebraska*, 470 F.2d 944 (8th Cir. 1973); *Gardiner Manufacturing Co. v. United States*, 12 U.C.C. Rep. 669 (9th Cir. 1973); *United States v. Hext*, 444 F.2d 804 (5th Cir. 1971).

Thus, the Uniform Commercial Code, even if it is not applicable in this case as state law, is applicable as federal law.

### 3. 31 U.S.C. § 200(a) DOES NOT PRECLUDE APPLICATION OF THE UNIFORM COMMERCIAL CODE STATUTE OF FRAUDS

Plaintiff argues that the statute of frauds contained in Section 1-206 of the Uniform Commercial Code cannot be the applicable federal law because Congress has created



an applicable federal statute of frauds in 31 U.S.C. § 200(a) (Pl. Br. 73).\*

Plaintiff's theory is as follows: (1) Section 200(a) is a statute of frauds setting forth the circumstances under which any contract with the United States must be in writing; and (2) since Section 200(a) applies only to contracts whereby the United States is obligated to pay money, no writing is required where the other party (*i.e.*, Con Edison) is the money obligor.

Con Edison submits that the District Court was correct in concluding that the form, language, and legislative history of Section 200(a) conclusively demonstrate that it is not a statute of frauds. The District Court was also correct in concluding that the provision, even if construed as a statute of frauds, would apply only to certain types of contracts where the government is obligated to pay money, and its silence as to other types of contracts does not imply that they require no writing. (A1329-A1330)

a. *31 U.S.C. § 200(a) Is Not A Statute Of Frauds*

If 31 U.S.C. § 200(a) is a statute of frauds, Congress has quite effectively disguised it. As the District Court found (A1329), legislative history clearly shows that this statute was passed in response to a specific problem before the Congress, *i.e.*, the need for executive responsibility, and that Congress, in enacting it, was not intending to enact a statute of frauds—and certainly not an *exclusive* statute of frauds for all government contracts. The provision was enacted by Congress as part of the Supplemental Appro-

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\* "After August 26, 1954 no amount shall be recorded as an obligation of the Government of the United States unless it is supported by documentary evidence of—

"(1) a binding agreement in writing between the parties thereto, including Government agencies in a manner and form and for a purpose authorized by law, executed before the expiration of the period of availability for obligation of the appropriation or fund concerned for specific goods to be delivered, real property to be purchased or leased, or work or services to be performed; . . ."

priation Bill, 1955 for reasons stated by the House Committee on Appropriations:

"Over a period of years numerous loose practices in handling appropriated funds have grown up in various agencies of the government. The most difficult problem in this area arises from the recording of various types of transactions as obligations of the government when, in fact, no real obligation exists. This situation has become so acute as to make it next to impossible for the Committee on Appropriations to determine with any degree of accuracy the amount which has been obligated against outstanding appropriations as a basis for determining future requirements. It has become necessary to set forth definitively in the law the types of transactions which will be recognized as true obligations and secure accurate reporting thereon in order that it may be possible for the Committee on Appropriations to have a sound basis for its operations. Section 1111 therefore has been included in the bill to accomplish this purpose." H.R. Rep. No. 2266, 83d Cong., 2d Sess. 49-50 (1954).

*See also* Hearings on H.R. 9936 Before the Senate Committee on Appropriations, 83d Cong., 2d Sess. 989 (1954).

Nowhere in the legislative history of Section 200(a) is it termed a statute of frauds or referred to as affecting the enforceability of government contracts. The debate on the Senate floor indicates that the legislative branch was at that time agitated over excessive spending by the executive, 100 Cong. Rec. 13056-57 (1954), and Section 200(a), which attempted to foster executive accountability, was part of the Congressional reaction. The "overall purpose of [§ 200(a)] was to restrict the amounts recorded as obligations," 35 Comp. Gen. 185, 187 (1955), not to limit a party's power to make an enforceable contract.



The main purposes of a statute of frauds are "to prevent the foisting of an obligation of specified classes by perjury upon one who had never assented to assume it," 2A Corbin, Contracts § 275 (1950), and to avoid the perils of error in the spoken word—particularly years after the words were allegedly spoken. *See, e.g., Burns v. McCormick*, 233 N.Y. 230, 234 N.E. 273 (1922). Congress evidenced no concern with such purposes during its consideration and development of Section 200(a).

Moreover, the very language of Section 200(a) belies its purported status as a statute of frauds. There are no words prohibiting enforcement of contracts, no reference to the type of writing required (*e.g.*, must it be signed by the party against whom enforcement is sought?), and no listing of any of the traditional limitations and exceptions to the writing requirement—all of which can be found in most statutes of frauds from the original version of 1677 to the modern Uniform Commercial Code.\*

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\* *United States v. American Renaissance Lines, Inc.*, 494 F.2d 1059 (D.C. Cir.), *cert. denied*, 419 U.S. 1020 (1974) (Pl. Br. 74-75) does not compel a different conclusion. In *American Renaissance*, the alleged contract was a charter party where the United States was the alleged money obligor. There the court did, as one basis for its opinion, interpret Section 200(a) as in effect establishing at least a limited kind of statute of frauds (despite the arguments there of the government, which urged that Section 200(a) did *not* establish a statute of frauds, contrary to the government's present position). However, the court also based its holding largely on certain regulations which, according to the court, contained requirements of a writing but which are not relevant to the present case. The court's interpretation of Section 200(a) as a statute of frauds appears in any event to be an isolated one. Moreover, *American Renaissance* does not support plaintiff's position that an oral contract is enforceable if it is not one of the kinds of contract expressly covered by the terms of Section 200(a). As plaintiff admits, its alleged contract with Con Edison is not covered by the statute. (Pl. Br. 75) But the contract at issue in *American Renaissance* was expressly covered by Section 200(a), and the court remained silent as to the statute's applicability to types of contracts not enumerated therein.



b. *Even If Section 200(a) Is A Statute Of Frauds, It Does Not Render The Alleged Contract Enforceable*

Even if Section 200(a) is somehow construed as a statute of frauds, it would not supersede U.C.C. § 1-206 as the applicable federal rule in the present case.

As plaintiff concedes, Section 200(a) by its terms does not apply to the alleged contract with Con Edison because the Government is not thereby obligated to pay any money. (Pl. Br. 75) According to plaintiff, however, since the contract alleged in this case is not covered by Section 200(a), then Congress tacitly has decreed that it need not be contained in writing. To view Section 200(a) as a statute of frauds is problematic enough, but to hold that Congress has in effect "pre-empted the field" of statutes of frauds with Section 200(a) not only strains the imagination but threatens implausibly unfair results. Because of the statute's limited coverage, the Government could make use of a statute of frauds type defense merely because it happens to be the money obligor, while private parties could not assert the same defense upon similar contracts with the Government. There is no indication that Congress intended such an eccentric rule and no case authority for the proposition that a court faced with the instant choice of law must exclude consistent state law whenever a federal statute touches some part of a subject matter. If Congress has legislated any statute of frauds with respect to government contracts, it has not done so with respect to the kind of contract alleged by plaintiff, and the District Court was correct in applying U.C.C. § 1-206 alternatively as a federal rule supplementing the limited scope of Section 200(a). Thus, as either state law or federal law, U.C.C. § 1-206 is the statute of frauds applicable to the contract alleged here.

**B. Section 1-206 of the Uniform Commercial Code Bars Enforcement of The Alleged Contract**

Plaintiff argues that Section 1-206 of the Uniform Commercial Code, under which "a contract for the sale of per-

sonal property" is not enforceable unless evidenced by a writing, does not apply to the instant circumstances because plaintiff did not "sell" anything to Con Edison. As the District Court correctly found, plaintiff's position is contradicted by overwhelming evidence that plaintiff at all times intended to transfer its contracted-for rights to power to Con Edison. (A796-A797) Because transfer of a contract right is a "sale" under U.C.C. § 1-206, the District Court barred enforcement of the alleged contract. (A1321)

Plaintiff defines "sale," citing U.C.C. § 2-106, as "the passing of title from the seller to the buyer for a price."\* Since "no title passed to Con Edison", plaintiff concludes, "the AEC did not sell anything to Con Edison." (Pl. Br. 67) Plaintiff's theory is that the AEC simply relinquished its contract rights to the suppliers of the power, and nothing more. (Pl. Br. 65-68)

An overview of the transaction reveals the distortion in plaintiff's argument. First, it was clear from the initial telephone conversations between White House officials and Con Edison that plaintiff was interested in transferring its power rights to *Con Edison*. (CE Br. 13-17) The White House press release announcing the reduction stated "that the Atomic Energy Commission will make available several hundred megawatts of power to the *Consolidated Edison Company serving New York City*." (A2064-A2065, DX R-3) (emphasis supplied). The telephone conversations between the government officials involved also confirm that the AEC was not making an absolute relinquishment of its rights. For example, Quinn acknowledged that it was "clear" from his conversations with Freeman of OEP and Kriegsman of the White House that the released power would go to Con Edison, and that "it would not be relinquished simply

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\* It is doubtful that the § 2-106 definition is applicable to the provisions of Article 1 of the Code. Section 2-103 states: "Other definitions *applying to this Article or to specified parts thereof* . . . are: . . . "Sale". Section 2-106, . . ." (emphasis supplied) Moreover, the general definitions contained in Article 1 do not include one for "sale".



to the suppliers for them to do with it what they wished." (A274, A283)

The AEC's letter agreements with TVA and OVEC confirm that the sole object of any alleged contract between plaintiff and Con Edison was the release to Con Edison of plaintiff's right to the power. The letter agreements with TVA explicitly refer to a request by the Office of the President of the United States that the AEC "reduce its use of electrical power . . . and *release the electrical power to Consolidated Edison Company of New York.*" (A1548-A-1551, PX 16, 17) (emphasis supplied) Similarly, the letter agreement with OVEC specifically refers to a request by the Office of the President that "AEC release electric power to assist Consolidated Edison Company of New York." OVEC and the AEC agree in this document that "OVEC will effect arrangements under which [the] power . . . will be made available . . . to Consolidated Edison Company of New York." (A1546-A1547, PX 15) Moreover, each of the agreements provides that the utility (TVA or OVEC) should attempt to collect a surcharge from Con Edison and each states that the reduction might cease when the utility notified the AEC that Con Edison no longer needed the power. Clearly, the plaintiff's release of the rights to the power was a release to Con Edison, and TVA and OVEC were not free to use the power as they liked during the reduction. The language of these documents demonstrates that the alleged contract between plaintiff and Con Edison involved plaintiff's transfer to Con Edison of plaintiff's right to obtain the 200 MW.

Three letters from Quinn to Luce, written in the aftermath of the release, further indicate that a transfer of a contract right, or a "sale," to Con Edison was involved. (A1555, A1557-A1560, A1569, PX 21, 25, 29) Quinn characterizes the AEC power as "currently being diverted to Consolidated Edison from our gaseous diffusion plants." (A1555) These letters, Quinn's testimony, and the letter agreements, among other things, caused the District Court to dismiss plaintiff's contract claim. (A796-A797)



Plaintiff seeks to attach some significance to the fact that the AEC's long-term contracts with its suppliers contained no provision permitting an assignment of the AEC's right to power. (Pl. Br. 67) However, that no right of assignment was expressly included does not mean that the right to transfer was prohibited. Moreover, the evidence is clear that TVA and OVEC did not choose to assert any objections and, by agreeing to the contract modification, waived any they might have had.

Plaintiff has misplaced its reliance upon authorities stating that an agreement not to enforce a contract right is outside the statute of frauds. (Pl. Br. 67-68) Since the clear thrust of the instant transaction was a *transfer* of contract rights to Con Edison, plaintiff cannot rely upon authority dealing with *abandonment* of such rights. For the same reason, plaintiff is incorrect in analogizing the alleged contract to a settlement, or a rescission of a contract, or a contract for services. (Pl. Br. 69-70) None of these transactions involves a transfer.

Plaintiff also takes far too narrow a view of a "sale" or "transfer." (Pl. Br. 67) A "sale" does not invariably involve only two parties. For example, a sale occurs when A orders B, a florist, to send flowers to C and promises to pay for the same. *O'Brien v. Isaacs*, 32 Ill. 2d 105, 203 N.E. 2d 890 (1965). See also *Acme Industries, Inc. v. National Cash Register Corp.*, 16 U.C.C. Rep. 302 (Kan. 1975) (A sold machines to B, who purported to "lease" them to C; court found a buyer-seller relationship between A and C). Thus, even if plaintiff offered only to modify its long-term power contracts with TVA and OVEC or only to transfer rights back to the utilities which would then be passed along to Con Edison, the transaction may still be characterized as a "sale," with Con Edison as buyer.

In summary, because the transaction between plaintiff and Con Edison clearly involved a transfer of contract rights, and because Section 1-206 precludes enforcement of

such transfers in the absence of a writing—a point plaintiff does not dispute, the District Court properly dismissed the contract claim contained in Count One.\*

### CONCLUSION

For all the above reasons and those stated in Con Edison's previous brief, the judgment of the District Court so far as appealed from by Con Edison should be reversed and the remaining causes of action of the complaint dismissed, and the Government's cross-appeal should be denied.

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March 3, 1978

Respectfully submitted,

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\* As established in Part III of this Argument, the District Court erred in finding that a valid contract arose from the telephone conversation between Luce and Quinn on July 24, 1970. Thus, even if no statute of frauds is applicable, there is no underlying contract that may be enforced against Con Edison.



②

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UNITED STATES ATTORNEY

3/3/78

Maurice J. Byrnes



